No. 2809

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

WILLARD N. JONES,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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CITATIONS.

MISCELLANEOUS

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STATEMENT.

In the brief of defendant in error counsel raises two questions which were not assigned as error by the plaintiff in error, nor presented in its brief, to-wit:

1. That the action is barred by the statute of limitations;

2. That the minimum government price is the utmost that can be recovered.

As to the latter question this court has stated that it would not pass upon same, but would consider the former question, and it therefore becomes necessary to reply to the argument of counsel for the defendant with respect thereto.

The complaint avers that the patents were issued to all the entrymen involved in this case between the dates of September 26, 1902, and October 12, 1903. This action for damages for the alleged fraud and deceit was instituted June 11, 1912. A demurrer to this complaint was filed by the defendant on the ground that the cause of action was barred by the statute of limitations, and in support of this demurrer counsel for the defendant submitted section 8 of the Act of March 3, 1891, which reads as follows:

> "Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The lower court overruled this demurrer and in an opinion reported in United States vs. Jones, 218 Fed, 973, held that this act does not apply to actions by the United States to recover damages for alleged fraud com-

mitted in procuring the government's title to public lands through fraudulent entry and proof under the homestead act. Thereupon, the defendant filed his answer and for a second further and separate defense again set up the statute of limitations as a bar to this action, demurrer to which the court sustained, holding that this had already been adversely decided against defendant.

ARGUMENT.

While it may be true that the patents were issued more than six years prior to the commencement of this action, it will be noted that this is not a suit in equity to rescind the patents as particularly covered by this statute of limitations, but is an action at law for the recovery of damages which necessarily implies a ratification of the patents. Furthermore, it must be conceded, we believe, that it is the settled law that the government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound. (United States vs. Inslay, 130 U. S. 263). The statute of limitations cited by defendant in support of his contention, therefore, does not apply to this action for damages for it is not so manifested therein, but, on the contrary, clearly pertains to suits in equity for rescission.

This particular question has been decided adversely to defendant's contention in three very recently reported cases, all of which are directly in point, to-wit:

United States vs. Pitan, reported in 224 Fed. 604,

United States vs. Koleno, reported in 226 Fed. 180,

Bistline vs. United States, reported in 229 Fed. 546.

United States vs. Pitan, 224 Fed. 604:

This was an action for damages for fraud committed by the defendant in procuring patents to public land through fraudulent proofs. Demurrer to this complaint was filed on the ground that the action was barred by the statute of limitations. The demurrer was overruled, the court holding that the act of March 3, 1891, does not apply to action for damages for fraud, but merely to suits in equity to rescind the patent. And the court in that decision considered the same points raised by Willard N. Jones in his brief, to-wit: that this statute barred the right as well as the remedy; and the case of United States vs. Chandler-Dunbar Company, 209 U. S. 447, was likewise submitted by de-

fendant in support of his contention. The opinion of the court, in part, reads as follows:

It will be observed that the patent for this

~~It is further contended in behalf of defendant~~ land was issued more than six years prior to the commencement of this action, and this action is not an action in equity for the cancellation of the patent, but an action at law for the recovery of damages sustained by the plaintiff for the reasons set forth in the complaint, the substance of which is as above stated. * * *

"It is further contended in behalf of defendant Pitan that, the statute of limitations adopted March 3, 1891 (26 Stat. 1099, c. 561), having run against annulment of the patent, the statute bars, not only the remedy, but the right, and therefore this action will not lie for recovery on account of the fraud perpetrated in acquiring title to the lands. That the general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound, is so well settled that it needs no citation of authority. U. S. vs. Inslay, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; U. S. vs. Jones (D. C.), 218 Fed. 973.

The statute relied upon by the defendant, in so far as it is material here, is as follows:

'An act to repeal timber culture laws and for other purposes,' approved March 3, 1891 (26 Stat. 1095, 1099, c. 561).

'Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this

act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' Section 8.

Does this statute bar, not only the remedy, but the right, and therefore will no other right of action lie for recovery on account of the fraud perpetrated in acquiring title to the lands in question: In view of the rule above stated, that the government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound, can it be said that, by a fair interpretation of this provision of the law of 1891, Congress intended that the United States should from that time be limited, under circumstances such as are alleged in the complaint herein, to an action in equity to cancel the patent?

Clearly the United States, in common with the individual citizen, at the time of the enactment of this statute, might have more than one right of action growing out of the fraudulent acts of the defendants set forth in the complaint, and in my judgment it had the right to avail iself of its different remedies, the same as an individual. One of those remedies was the right to bring an action for damages sustained by the plaintiff by reason of the false and fraudulent representations made by the defendants, whereby the plaintiff was induced to and did part with the title to the land in question.

It is urged, however, that this remedy does not survive the expiration of the statutory period of six years named in this statute; it being conceded that while, in form, this statute only bars suits to annul the patent, by analogy to statutes of limitation gen-

erally, with regard to land, it should now be held to affect the title, and that with the loss of the right to retake the title, which has been divested through the defendant's wrong, it follows necessarily that with the loss of that right the plaintiff loses the right to bring the action to recover damages for the same wrong.

I have carefully considered the language of the court in United States vs. Chandler-Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, and find some justification for the defendant's position; but considering the fact that the relief in that case was for the cancellation of the patent, and that the language there used had reference only to the question of plaintiff's right to that relief, I am satisfied it was not the intention of the court to hold that it was the intenion of Congress when this statute of limitation was enacted, to extend the limitation further than its express language indicates. I am satisfied, also, that by the enactment of this statute there was no intention on the part of Congress to disturb the general governmental policy with reference to the bringing of actions generally by the United States to assert any public interest, or to enforce any public right, and that the rule with reference to such actions, including the right to bring this action for damages, is in no wise affected by the statute in question.

I am of the opinion that the sole purpose of this statute of limitation was to give stability to titles depending on patent from the government; its effect being to confirm such title after six years in the patentee, or his assignee, and to waive any right of action it may have had for annulment of the patent, but in no manner intended to bar the gov-

> ernment of its right of action to recover damages for fraud such as is alleged in the complaint herein. It follows, therefore, that this court is of the opinion that the government of the United States has a right of action to recover damages against the defendants Henry and Pitan, sustained by it by reason of the alleged fraud of such defendants."

It will thus be seen that this case, clearly in point, answers all the arguments raised by defendant in his brief. The government had been conceded at all times to have the right to an election of two remedies where patents had been secured through fraud, to-wit: the right to sue in equity to rescind the patent, or else to ratify the patent and sue for damages. It has chosen the latter remedy which clearly is not affected by the statute of limitations, the sole purpose of such statute merely being to confirm patents after six years, and thus give stability to titles depending upon patents from the government.

United States vs. Koleno, 226 Fed. 180:

This was an action at law to recover damages for fraud in securing patents under the homestead law. Demurrer was interposed on the ground that the action was barred by the statute of limitations, which demurrer was sustained by the lower court, but reversed by the circuit court of appeals for the eighth circuit.

The facts in that case are also identical with the case at issue. The court held there that the act of March 3, 1891, was strictly a statute of limitations and did not create the right to maintain an action to set aside the patent; that patents procured from the United States by fraud are not void, but voidable, and the government may elect to rescind the patent or to ratify it and sue for damages.

Bistline vs. United States, 229 Fed. 546:

This was an action at law for damages for fraud in securing patents. This case is squarely in point with that in issue, the action having been brought for the recovery of damages arising by the fraudulent procurement of defendant's title to 160 acres of public land, patent having issued therefor more than six years prior to the commencement of the action. In that case counsel for Bistline invoked the same argument as that advanced by counsel for the defendant Jones and relied largely upon the same authorities, particularly with reference to the decision of the supreme court in the case of United States vs. Chandler-Dunbar Company, 209 U. S. 447.

In the Bistline case demurrer was also filed to the action on the ground that it was barred by the statute

of limitations, and the lower court, in overruling same, held that this statute was one designed by Congress to give certainty and stability to land titles only, and could not be invoked in bar to an action for the recovery of damages accruing through the fraudulent procurement of patent. Upon writ of error to the circuit court of this circuit, the judgment of the lower court was affirmed, and bearing upon the question of the statute of limitations the opinion of this court was as follows:

> "It was alleged in the complaint that the patent in suit was issued to the defendant by the United States on June 30, 1906. The present action was commenced by the filing of the complaint on September 17, 1913—more than seven years thereafter. In support of its contention that the demurrer should have been sustained, the defendant invokes section 8 of the act of Congress of March 3, 1891 (26 Stat. 1093). That section provides as follows:
>
> 'Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.'
>
> It is sufficient to say that the section has no application to the present case. This is an action at law to recover specific damages for the fraudulent acquisition of land by the defendant from the government and for the subsequent fraudulent sale thereof by him to third parties. It is not a suit

to vacate or annul a patent. No attempt is being made by the government to recover the lands. They are left in the hands of the present owners. The act may not by construction be extended beyond the boundary fixed by its plain terms.

'The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt.' United States vs. Beebe, 127 U. S. 338, 344, S Sup. Ct. 1083, 1086, 32 L. Ed. 121; United States vs. Inslay, 130 U. S. 263, 266, 9 Sup. Ct. 485, 32 L. Ed. 968."

In the face of these decisions bearing squarely upon the point raised by defendant and in cases almost identical with the one at issue there seems to be no question as to the right of the government to maintain this action for damages and likewise that it is not barred by any statute of limitations.

for the sake of the argument

It may be conceded that a suit in equity by the government for the recovery of the lands is undoubtedly barred by the act of March 3, 1891, which limits the bringing of such suits to a period of six years after the date of the issuance of the patents. The question then arises, does this statute limit the United States to an equitable action for the recovery of the particular lands

or can the United States maintain an action for damages resulting through fraud and deceit practiced in obtaining title independent of any statute authorizing such action. It is apparent from a careful reading of the statute of limitations mentioned, that the statute in terms purports to apply only to suits to vacate or to annul patents. There is no reference therein to actions for damages or for the value of the land as upon an implied contract to pay what the land is worth, and it is contended by the government that while the United States, through the enactment of this statute and failure to bring suit for the recovery of these lands within the six-year period of limitation has consented not only to have its equitable remedy barred, but to have its right to recover the land extinguished and the title confirmed in the grantees, its consent to waive all remedy for the fraud practiced upon it is not necessarily implied. This is the effect of the decision in the case of United States vs. Bistline (supra).

It must therefore be conceded that the government is not remitted to a suit in equity. It has been held that a patent for land which has been obtained by fraud may be overthrown either in court of law or in equity. (9 Ency. Pl. & Pr. 678.)

In United States vs. Winona, etc. R. R., 165 U. S. 463, the intimation is that an action at law will lie in a case like this. The government is entitled to all the remedy which the courts can give (United States vs. Minor, 114 U. S. 241), and as the relief sought is not equitable in its nature, a court of law is competent to adjudicate the issue of fraud. The action is of a legal nature. The remedy at law is plain, adequate and complete.

It is urged by the defendant that the running of the six-year limitation against suits in equity for the recovery of the lands patented to the entrymen operates to bar a suit for damages by reason of the fact that title to the lands is now unassailable either by the government or in a collateral proceeding. It is not contended by the government that the title to these particular lands can be assailed, and this action is not brought to that end. If such a right of action as that here brought exists at all, it exists independently of the right to sue in equity for the recovery of the lands in question and is based upon a wholly different theory of the law. The suit here brought against Jones is not in any sense a collateral attack upon the patents issued by the United States to the entrymen used by Jones in obtaining patents to these lands and does not attempt to assail the

title thereto. This title has vested long since in the parties and their grantees and is secure from such attack. It is submitted, therefore, that the numerous cases cited by counsel for defendant in his brief and going to the question of collateral attack upon the patent issued by the United States, and granting portions of the public domain, are outside the issue. In all cases cited by counsel for the defendant and going to the question of collateral attack, the attack has been attempted by some one a stranger to the title, or the portions quoted from opinions are, as applying to the case at bar, mere dicta.

IN CONCLUSION.

The opinion of Judge Wolverton, reported in United States vs. Jones, 218 Fed. 973, overruling the defendant's demurrer on the ground that this action is barred so clearly and conclusively disposes of defendant's contentions in this respect that we take the liberty to quote fully therefrom as follows:

> "It is contended that the statute bars, not only the remedy, but the right, and therefore no other right of action will lie for recovery on account of the fraud perpetrated in acquiring title to the lands. The effect of the statute is tersely stated by Mr. Justice Holmes, in United States vs. Chandler-Dunbar Co., 209 U. S. 447, 450, 28 Sup. Ct. 579, 580 (52 L. Ed. 881), as follows:

'In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell vs. Warren, 2 Black, 599, 605 (17 L. Ed. 261); Shareon vs. Tucker, 144 U. S. 533 (12 Sup. Ct. 720, 36 L. Ed. 532); Davis vs. Mills, 194 U. S. 451, 457 (24 Sup. Ct. 692, 48 L. Ed. 1067). This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States vs. Winona & St. Peter R. R. Co., 165 U. S. 463, 476 (17 Sup. Ct. 368, 41 L. Ed. 789).'

And in a later case—Louisiana vs. Garfield, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92—it is said:

'In United States vs. Chandler-Dunbar Water Power Co., 209 U. S. 447 (28 Sup. Ct. 579, 52 L. Ed. 881), it was decided that this act applied to patents, even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy, but validated the patent.'

In other words, the running of the statute has the effect to vest in the patentee a perfect title to the land. Very true, but the statute is concerning suits to vacate and annual paents, and comprises but one remedy. That remedy having lapsed, the patent is validated, and the title becomes perfect in the holder under the patent. The language does not give it broader scope or operation.

It is settled law that the general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound. United States vs. Inslay, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968. The United States, like an individual, may have more than one right of suit or action growing out of the same transaction, and there exists no good reason why the government may not waive or avail itself of its remedies in like manner as can an individual. The point is well illustrated by the case of Southern Pacific Co. vs. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507, wherein it appears that the government, through mistake, patented to the railroad company quite a large body of land, which subsequently passed into the hands of innocent purchasers. The government sued to recover the value of the land, and the suit was sustained. In disposing of the case, Mr. Justice Brewer, speaking for the court, says:

'When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property.'

If the government may sue to recover the value of lands procured from it through mistake, why may it not sue to recover the value of lands procured

through fraud? In either case there are simply two remedies: One for the recovery of the land, where it has not passed to innocent holders; and the other for the value of the lands taken. It has its choice of remedies, and it may therefore waive one remedy and proceed upon the other. That, it seems to me, is all the government has done in the present case. Desiring to give stability to titles depending on patent from the government, it has preferred to confirm such titles after six years in the patentee, and thereby waive any right of action it may have had for annulment of the patent; but the language of the limitations act is not susceptible of broader construction and indicates no intendment to bar the government of its right of action to recover the value of land obtained through fraud.

I hold, therefore, that the present action is not barred by the statute."

It is, therefore, respectfully submitted that the contention of defendant that this action is barred by the statute of limitations is without merit.

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